Case No. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I.

Whether the procedure of Section 921.141, Florida Statutes is unconstitutional as applied to Morgan in the trial court because the judge and jury were precluded from considering the independent mitigating weight of the evidence which petitioner presented as the basis for a sentence of less than death?

II.

Whether the Florida Supreme Court has applied Florida's death penalty statute to Morgan in an arbitrary and capricious manner by upholding or finding that the murder in this case was especially heinous, atrocious or cruel while rejecting the same finding which used virtually the same language in another case?

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TABLE OF CITATIONS

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed by this petition is reported as Morgan v. State, 415 So.2d 6 (Fla. 1982). It is reproduced in the appendix as item 1 (A-1-7).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on March 18, 1982 (A-1-7). Petitioner filed a motion for rehearing which was denied on July 9, 1982 (A-8). Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his behalf, and to have the assistance of counsel for his defense.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Section 921.141, Florida Statutes (1978) which is set forth in the appendix as A-9-11.

STATEMENT OF THE CASE AND FACTS*

Following a trial held in Union County, Florida on June 14, 1978, Floyd Morgan was convicted of the murder of Joe Saylor, who was stabbed to death in his cell in Union Correctional Institute at approximately 2:00 a.m. on July 16, 1977. Following the jury's recommendation of death, the trial court sentenced Morgan to death on July 17, 1978. At the time of the murder, Morgan was under a sentence of 30 years imprisonment for second degree murder.

Glynn Griffin, another inmate, testified that at Morgan's request he made a knife for him in the prison shop. At the trial, Griffin identified a knife as the one he made. The knife was admitted into evidence. Griffin testified further that Morgan told him he wanted the knife in order to stab a man who owed him $400 and would not pay.

Dan Helton, one of Morgan's cellmates testified that he, the victim Joe Saylor, and two other prisoners were in their cell in bed and asleep by 12:00 midnight on the night of July 15. Helton testified that he was later awakened by a yell following which a cellmate told him to turn on the light. Then he saw Joe Saylor on the floor covered with blood.

Michael Daley, a prisoner whose cell was nearby, testified that he was sitting at a table in the hall writing

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* The statement of the case and facts is taken from the Supreme Court's opinion in this case. Additions are made for completeness only.

a letter that night after most of the other prisoners had gone to sleep. He heard noises from Morgan's cell. Then, Morgan walked out of the cell, and walked down the hall toward a lavatory. Daley followed him to find out what had happened. In the lavatory, he saw that Morgan's right hand was cut on the palm side across the base of the fingers.

William Williamson, who slept in a nearby cell, was reading at 2:00 a.m., he testified, when he heard noises. He ran out of his room and saw Morgan whose hand was bleeding. Morgan said, "I killed him."

On the morning of the murder, Morgan was interrogated by prison investigators. Inspector Ackett testified that Morgan voluntarily made a statement admitting that he committed the murder. That same day, Morgan was removed from his residence at Union Correctional Institute and taken to the Lake Butler Reception and Medical Center, where he was confined until September 9, 1977. Then he was transferred to Florida State Prison until his arraignment on January 16, 1978. Morgan was indicted on November 28, 1977, and was represented by counsel at his arraignment.

On May 19, 1978, Morgan filed a pro se motion for discharge from the accusation made in the indictment, asserting that the state's failure to afford him a "prompt first appearance" under Florida Rule of Criminal Procedure 3.130(b) and its failure to afford him a probable cause determination under Florida Rule of Criminal Procedure 3.131 and to cite a case of Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), had denied him due process of law. The trial judge denied the motion without a hearing and declared in his order that he would not consider any more pro se motions of the defendant.

Upon appeal, the Florida Supreme Court affirmed the trial court's judgment and sentence (A-1-7), and denied rehearing (A-8).

REASONS FOR GRANTING THE WRIT

I.

THE PROCEDURE OF SECTION 921.141, FLORIDA STATUTES IS UNCONSTITUTIONAL AS APPLIED TO MORGAN IN THE TRIAL COURT BECAUSE THE JUDGE AND JURY WERE PRECLUDED FROM CONSIDERING THE INDEPENDENT MITIGATING WEIGHT OF THE EVIDENCE WHICH PETITIONER PRESENTED AS THE BASIS FOR A SENTENCE OF LESS THAN DEATH.

Before presenting evidence to the jury during the penalty phase of Morgan's trial, Morgan raised the due process challenge to the aggravating and mitigating circumstances under Section 921.141, Florida Statutes (1977), on the grounds that "they do not adequately define, to the jury, what it is they are to consider as aggravating circumstances and mitigating circumstances" (R-647). That is, the death penalty statute as applied to Morgan violates the Eighth and Fourteenth Amendments to the United States Constitution because it severely limited the scope of mitigation which the jury and judge could consider in determining whether he should live or die.

The Florida Supreme Court, however, rejected this position:

> We have specifically held, however, that Section 921.141 and the procedure utilized thereunder are in keeping with the principles of Lockett [v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).]

The penalty phase of trial took place on June 15, 1978; and on July 3, 1978, the United States Supreme Court handed down its decisions in Lockett, supra, and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), which hold that the Eighth and Fourteenth Amendments require that in all but the rarest capital cases, the sentencer must not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death.

Apparently contrary to the holding of Lockett, the Florida Supreme Court in an earlier case, Cooper v. State, 336 So.2d 1139 (Fla. 1976) said that the mitigating circumstances

to be considered by the judge and jury were limited to those in the statute:

> In any event, the legislature chose to list the mitigating circumstances which it chose to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
>
> (Emphasis added.) 336 So.2d at 1139.

Nevertheless, in a later case, Songer v. State, 365 So.2d 696 (Fla. 1978), the Florida Supreme Court tried to reconcile Cooper with this Court's holding in Lockett:

> As concerned the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording on a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913.

Despite such hindsight determination from the Florida Supreme Court, the language of Cooper was a clear indication that the statutory list of mitigating circumstances was exhaustive. Following the language in Cooper, however, resulted in the use of procedures in this case which have limited the jurys' and judges' consideration of evidence in mitigation; if it does not fit one of the enumerated mitigating circumstances under the statute it is ignored by the judge and jury. Further, the Court's holding in Cooper indicated that the death penalty was mandatory if no mitigating circumstances were found, a procedure held unconstitutional in Lockett, supra. In Cooper the Florida Supreme Court said:

> In this case there were three aggravating and no mitigating circumstances. There is no alternative to the death penalty.
>
> 336 So.2d at 1142.

In this case, the Florida Standard Jury Instructions for the death penalty phase of a capital trial do not inform the jury that they could consider in mitigation of

a death sentence aspects of the defendant's character and record falling outside of the statutory mitigating circumstances (R-707-708). In particular, Morgan showed that (1) although he was under a sentence of imprisonment at the time of the capital felony, such was his first and only conviction of crime, he was incarcerated as a first offender; (2) that his sentence of imprisonment was not for a term of life imprisonment; (3) that Morgan was a trustee at the time of the capital felony and his prior prison record had been excellent; (4) that he had worked hard to educate himself and take advantage of the rehabilitation offered while in prison; (5) that he had suffered from identifiable psychological problems of dealing with his anger, aggression, feelings of inadequacy and feared his own inability to control his rage and that had the prison provided proper treatment of intense psychotherapy for him as recognized and recommended by prison authorities in 1975, that this offense possibly would not have happened; (6) that Morgan had served his country with the army in Vietnam; (7) that Morgan had been commended by Governor Askew for his quick and decisive action that allowed guards at Florida State Prison to escape from danger during the garment factory riots in April of 1973 (R-659-671).

Although appellant was allowed to show this evidence to the jury, the jury was not given proper instruction or guidance concerning what consideration they could give this evidence; the standard instructions by which the jury was informed of the law to be applied directed the jury that "the mitigating circumstances you may consider, if established by the evidence are as follows:" (A list of the statutory mitigating circumstances under Section 921.141) (R-707-708). This statutory scheme as applied to Morgan denied him due process of law because the jury was not given guidance through instructions as to what use it could make of the evidence offered in mitigation by him.**

** Florida has since changed that instruction to read: Among the mitigating factors which you may consider, if established by the evidence, are: (a list of the statutory mitigating circumstances under Section 921.141).

This Court, moreover, has recognized that inadequate jury instructions are a particularly sensitive problem in death cases. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 589 (1976):

> When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in Furman.
>
> But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. (Citations omitted.) To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision.
>
> The idea that a jury should be given guidance in its decision making is also hardly a novel position. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other legal course in a legal system that has traditionally operating by following prior precedents in fixed rules of law. See Gasoline Products Company v. Champlin Refining Company, 283 U.S. 494, 498, 51 S.Ct. 513, 75 L.Ed. 1188 (1931) Federal Rules of Civil Procedure 51. When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. (Emphasis supplied.)

428 U.S. at 191-193.

Here Morgan's jury was improperly limited on the range of mitigating circumstances it could consider. Hence, he was denied due process of law.

II.

THE FLORIDA SUPREME COURT HAS APPLIED FLORIDA'S DEATH PENALTY STATUTE TO MORGAN IN AN ARBITRARY AND CAPRICIOUS MANNER BY UPHOLDING OR FINDING THAT THE MURDER IN THIS CASE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL WHILE REJECTING THE SAME FINDING WHICH USED VIRTUALLY THE SAME LANGUAGE IN ANOTHER CASE.

Since Furman v. Georgia, 408 U.S. 238 (1972) capital sentencing statutes have focused upon eliminating arbitrariness and caprice from capital sentences. Proffitt v. Florida, 428 U.S. 242 (1976). A trial judge, faced with similar circumstances, should impose the same sentence, whether it be death or life in prison. Id. at 253. Thus, on its face, Florida's capital sentencing statute has withstood constitutional scrutiny because:

> ...in Florida...it is now no longer true that there is 'no meaningful basis for distinguishing the few cases in which [the death penalty] is now imposed from the many in which it is not.'
>
> Id. citing Gregg v. Georgia, 428 U.S. 153, 188 (1976).

In this case, the trial court found that the murder was especially heinous, atrocious, or cruel. Section 921.141(5)(h), Florida Statutes (1979):

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR, SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.
>
> Defendant's senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated total disregard for the life and safety of his victim. It was especially cruel because the victim had been denied his right to live and his right to return to society, his family and friends after satisfying his societal debt for the crime for which he was in prison. The fact that he was an inmate makes his life no less precious than that of any other citizen in a free society. Furthermore, one confined to a penal institution has little or no opportunity to flee from or exercise the right of self defense against

> homocidal assaults such as that seen here. It is the Court's opinion there are very strong aggravating circumstances under this condition.

In another prison stabbing unrelated to this case coming from a neighboring prison, Demps v. State, 395 So.2d 501 (Fla. 1981), the trial court used virtually the same language to find that murder to be especially heinous, atrocious, or cruel:

> THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL. "HEINOUS" MEANS EXTREMELY WICKED OR SHOCKINGLY EVIL. "ATROCIOUS" MEANS OUTRAGEOUSLY WICKED AND VILE. "CRUEL" MEANS DESIGNED TO INFLICT A HIGH DEGREE OF PAIN, UTTER INDIFFERENCE TO OR ENJOYMENT OF THE SUFFERING OF OTHERS; PITILESS.
>
> Defendant Demps' senseless killing of his fellow inmate was extremely offensive and cruel and demonstrated a total disregard for the life and safety of victim Alfred Sturgis. It was especially cruel because the victim has been denied his right to live and his right to return to society, his family and friends after payment for the crime he committed which resulted in his imprisonment; and the fact that he was an inmate does not make his life any less precious than any citizen in a free society.
>
> It is the Court's opinion there are very strong aggravating circumstances under this condition.
>
> Id. at 505.

The similarity of findings, however, is not the error. The problem presented by this case stems from the opposite treatment the Florida Supreme Court gave each aggravating factor. In Demps, the Supreme Court rejected this factor:

> We do not believe this murder to have been so "conscienceless or pitiless" and thus "set apart from the norm of capital felonies" as to render it "especially heinous, atrocious, or cruel." See Lewis v. State, 377 So.2d 640 (Fla.1979); Cooper v. State, 336 So.2d 1133 (Fla.1976); Tedder v. State, 322 So.2d 908 (Fla.1975).
>
> (Footnotes omitted.) Id. at 506.

Yet, in this case, the Florida Supreme Court said:

> Under established precedent interpreting the capital felony sentencing law, the third aggravating circumstance (heinous, atrocious, or cruel) is also supported. The evidence showed that the death was caused by one or more of ten stab wounds inflicted upon the victim by appellant. See Rutledge v. State, 374 So.2d 975 (Fla.1979), cert.denied, 446 U.S. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267 (1980); Foster v. State, 369 So.2d 928 (Fla. 1979), cert.denied, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); Washington v. State, 362 So.2d 658 (Fla.1978), cert. denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L. Ed.2d 666 (1979).

Surely there is nothing more arbitrary than to reject the same factor in one case, yet accept it in another when no distinction is apparent in the Court's findings in the two cases.

The Florida Supreme Court, however, on its own, found the murder to be heinous, atrocious, or cruel, because Morgan stabbed the victim ten times. Yet Morgan had no notice that this murder was especially heinous, atrocious, or cruel because of the stab wounds, and it was unfair of the Florida Supreme Court to find this aggravating factor applied to him for reasons different than those found by the trial court. Presnell v. Georgia, 439 U.S. 14 (1978). As the Supreme Court has said, its function is only to review, not to reweigh or reevaluate the evidence presented supporting the aggravating or mitigating factors. Brown v. Wainwright, 392 So.2d 1326,1331 (Fla. 1981).

Thus, as applied to Morgan, Florida's capital sentencing scheme has not provided a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Godfrey v. Georgia, 446 U.S. 420 (1980).

CONCLUSION

For the reasons stated, Morgan asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief, Appellate Division
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

NO. 82-5519

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

FLOYD MORGAN, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Petitioner

(Member of the Bar of this Court)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Floyd Morgan, #029689, Post Office Box 747, Starke, Florida, 32091; and by hand delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 4th day of October, 1982.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FLOYD MORGAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

I, FLOYD MORGAN, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Floyd Morgan
FLOYD MORGAN

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of FLOYD MORGAN was subscribed and sworn to before me this 28 day of Sept 1982, 1982.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982